Testimony before the Interim Judiciary Committee
Symposium on Evidence-Based Practices - SB 267
February 3-4, 2004

Michael Marcus, Circuit Judge
503 988 3250
Michael.H.Marcus@OJD.State.Or.US
http://www.smartsentencing.com

I regret that I am unable to attend this symposium, but wish to offer some thoughts in this important endeavor. As you will hear from the presenters, academia and the corrections community has amassed a sizeable body of literature about what works to reduce criminal behavior. Although this learning has been accessible for decades, we have done very little to implement its recommendations. Criminal justice functions almost entirely without any meaningful attempt to benefit from the wisdom contained in much (though certainly not all) of this literature. And academia, for its part, rarely makes any substantial effort to improve the criminal justice system's crime reduction performance. SB 267 represents a major step forward because it embodies a strategy for making what works matter in our behavior, to the end that we do a better job of crime reduction with those we subject to corrections. But we have so very far to go:

1. We need drastically to broaden strategies by which to make "what works" improve the public safety impact of criminal justice agencies – particularly within plea bargaining and sentencing practices:

SB 267 is remarkable in part because it reflects a strategy to make what works matter. What works does not generally govern what we do. By its terms, SB 267 requires only that half of agencies' program funds be spent on evidence-based programs – implying that the other half may be spent on programs without evidentiary support. This recognizes the need to phase in a change; it affords an opportunity to evaluate and modify the direction for change; it allows for innovation extending modalities beyond those that have accumulated sufficient attention from academia to be deemed "evidence-based." This is fine and good, but dramatically limited as a strategy by this simple circumstance: the sentencing process (and the plea bargaining process which produces the vast majority of sentences by agreed recommendation) determines which offenders will be sent to prison, placed on probation, and for how long. Though sentencing obviously affects whether and to what extent any offender will be exposed to a given set of "evidence based programs," *sentencing and plea bargaining (and the prosecutorial discretion as to which crimes and offenders to prosecute, and the law enforcement deployment and priority decisions which precede prosecutions) are not "evidence based."* That is at least a major reason for alarming recidivism realities: *e.g.*, 22 of the 23 people jailed in Portland in July 2000 for robbery had been in the same jail within the prior 12 months; four percent of the people booked into that jail 1995-1999 accounted for 23 percent of the total bookings; and seven out of ten people in any jail in the U.S. have probably been incarcerated before.

Sentencing guidelines are not "evidence based" – they are designed to regularize the balance between available resources and notions of blameworthiness and crime seriousness. They do not focus the attention of the participants on crime reduction. Laws providing maximum and minimum sentences are not "evidence based," although the repeated popular and

legislative attention to minimum and lengthened sentences is an attempt to improve the public safety outcomes of the sentences we impose. These laws have generally served public safety by increasing the period of incapacitation for serious offenders, but we have little available data about the relative magnitude of crime reduction during incarceration and recidivism increased after prison according to several studies. We have lots of "research" about alternative programs, but virtually none rigorously addressing the public safety impact of various terms of incarceration or fairly comparing the incapacitative impact of incarceration with the success of alternative sanctions or programs.

This serious gap in the available evidence about what works is the result of an unfortunate schism within the literature. Much of academia finds incapacitation distasteful and believes we have gone way overboard in our incarceration rates. Instead of fairly researching how all the variables of offender and response affect public safety, most of academia largely ignores the impact of incapacitation upon crime during incarceration, and focuses instead on increased recidivism *after release from prison* – or attacks the notion of incarceration for crime reduction altogether by disparaging it as "preventive detention," bemoaning its "false positives," and urging that we abandon public safety as a goal of sentencing altogether. This tendency unfortunately undermines the credibility of a good deal of research responsibly directed to other questions.

Apart from the therapeutic courts – drug courts, DUII courts, and so on (which represent an important exception, but not the mainstream of the criminal justice system), the criminal justice culture that determines most outcomes through plea bargains and traditional sentencing wholly avoids any attempt at best efforts for crime reduction. The result is that pursuit of public safety is either accidental, divorced from evidence, or nonexistent in a deplorable majority of the sentencing decisions which determine which offenders will even be exposed to "programs." This remains so in spite of the declarations of the people of Oregon by constitutional amendment that "protection of society" is the first purpose of sentencing (Or Const Art I, §15); of this legislature that crime reduction should be the measure of our performance in criminal justice (1997 Or Laws Ch 433); and of the Oregon Judicial Department that judges should focus sentencing and probation hearings on "the likely impact of the choices available to the judge in reducing future criminal conduct" (1997 Oregon Judicial Conference Resolution #1). Similarly, we have failed to heed the first recommendation of the Criminal Justice Commission's current Public Safety Plan, that "Oregon should develop availability of offender-based data in order to track an offender through the criminal justice system and to facilitate data-driven pre-trial release, sentencing and correctional supervision decisions."

2. Traditional studies (and the increasingly common studies of studies) are not the only source of "evidence."

You will hear in this symposium from researchers. I am delighted by their attempt to get policy-makers and the criminal justice system to exploit research to the end of improved public safety. But in the same manner as I promote smarter sentencing as a cure to our problem because I am a judge who sentences offenders, researchers tend to focus on the use of research. I am enthusiastically supportive of strategies for making our decisions about crime and punishment smarter by involving research and researchers, but want to add that existing studies (and studies of studies) are by no means the only – and not always the best – "evidence" of what works.

As recognized by 1997 Or Laws Ch 433 (1997 HB 2229), and the failed efforts to construct a Public Safety Data Warehouse – as well as the Criminal Justice Commission recommendation just quoted – there exists a wealth of data generated by what we do to various offenders and what they do next, and that data can be exploited vastly to improve the intelligence of our sentencing, programming, release, correctional, and policy decisions. Just ensuring that every exercise of sentencing discretion or plea bargaining leverage be cognizant of how similar offenders sentenced in the past behaved after their sanction would profoundly improve our chances of reducing crime. Yet persisting criminal justice practices almost everywhere in Oregon are entirely blind to such data.

Properly designed and delivered, access to this data has an importent advantage over most traditional research: it can be tailored much more precisely on the characteristics of the offender before the court at the time of sentencing. Traditional research studies consider a cohort of offenders and explore a set of variations to compare and assess. By virtue of inherent categorization – greatly exacerbated when researchers study other studies – important variations within cohorts are usually entirely ignored. We get conclusions such as "boot camp doesn't reduce recidivism, at least unless it includes good treatment programs," or "30 day or graduated jail sanctions have no advantage over five day jail sanctions in achieving compliance with probation conditions," or "prison terms over six months correlate with increased recidivism." Even with some refinements in cohorts, the paintbrush remains broad: "jail tends to increase criminality among low risk offenders."

With a sentencing support application and good data, we can immediately ask questions about what works *on whom and for what crimes* – instead of resting on the myth that we can talk meaningfully about "what works" without that refinement. With robust sentencing support tools, I can produce data showing, for example, how variations in age, gender, and flavor or criminal history among low risk offenders correlate with where and how much jail works better or worse than, say, community service; which probationers are better influenced by five day jail sanctions or 30 day jail sanctions, and even which cohorts of offenders are most or least likely to benefit from "boot camp" with and without which programs. (Multnomah County's tools currently can directly address the first of these questions, shed much more light than existing research on the second, but only contribute some useful analogies to the third). With sentencing support tools, we can also immediately see how various sanctions for a given cohort have compared in terms of different flavors of recidivism – such as property recidivism, theft recidivism, violent recidivism all recidivism, or even recidivism measured by arrests.

3. We have many opportunities to pursue additional strategies to make what works matter.

Multnomah County has demonstrated the feasibility of building sentencing support tools to show judges and advocates which sentences have and have not correlated with reduced criminal behaviors among varying offenders and crimes. There is no preference for incarceration or for alternatives; both are assessed by the same standards. (The Public Safety Data Warehouse held some promise of replicating this function on a state-wide level – though not enough promise to overcome shortcomings of budget and vision.) Multnomah County has also profoundly changed the role of presentence investigations by directing them to include "Analysis of what is most likely to reduce this offender's future criminal behavior and why, including the availability of any relevant programs in or out of custody." Presentence reports have just begun routinely to include such analysis, together with literature-based analysis and a report of

whatever useful data can be gleaned from our sentencing support tools. We hope and plan, in partnership with the Department of Community Corrections, to expand this analysis and use of literature data to routine probation reports and hearings.

These are all strategies to make what works more effectively affect our behavior in the criminal justice system. What we desperately need at the state level is similarly aimed strategies to make what works govern not just a small sample of what we do to those who end up in DOC programs, but the vast majority of law enforcement, criminal justice policy-making, pretrial release, plea negotiation, sentencing, supervision, and corrections decisions.

Here are some modest proposals, offered as examples:

- Direct or request the Criminal Justice Commission to study and recommend how the sentencing guidelines might be revised either in light of evidence of what works or to encourage the routine involvement of that evidence in sentencing – such as by expressly listing crime reduction improvement based on reliable data or sound research as a basis for an upward or downward departure from presumptive sentences [*expressing* this basis would encourage attention to public safety; this basis is now implicitly included as a potential reason for departure];

- Direct or request the Commission or the Criminal Justice Policy Research Institute at PSU [or both] to study and propose how to make data-based pursuit of crime reduction a dominant part of the practices of the players in criminal justice – law enforcement, judicial, prosecution, defense, pretrial release, custodial, correctional, and supervision;

- Direct or request the Commission, or the Criminal Justice Policy Research Institute at PSU [or both] to gather and distribute data and analysis that will help prosecutors, judges, defense attorneys, and probation officers rationally to determine what length and conditions (including programs and treatment) of jail or prison within legally available ranges actually best serve public safety through crime reduction with due consideration of the incapacitative effect of incarceration, the likely impact (positive or negative) on post-incarceration recidivism, and any available alternatives so that we might begin to make evidence-based individual and policy decisions in these areas;

- Direct information technology resources to the resurrection of the public safety data warehouse, site it in an agency demonstrably devoted to sharing data to improve public safety decision-making, and insist that providing support for operational decisions by law enforcement, prosecution, judicial, supervisory, and correctional officers be a top priority for the efforts (instead of merely allowing researchers to research and managers to plan for the continued expansion of criminal justice expenditures without improvement in our ability to divert offenders from criminal careers);

- Encourage or direct that prosecutors seek evidence and data-based sentences with plea negotiations, sentencing recommendations, and other prosecution policies, perhaps by requiring a "public safety impact statement" as part of plea petitions or the adoption or substantial modification of prosecution guidelines;

- Pursue better ways to encourage sentencing judges to access and consider research and data, and perhaps make specific findings, as to the likely success of crime reduction occasioned by exercise of sentencing discretion;

- Direct that budget proposals from criminal justice agencies lay out their relevant crime-reduction analysis, with supporting data and research, of expenditures for beds and programs.

Reliable data suggest that policy makers seriously underestimate the public's interest in crime reduction and rehabilitation, and overestimate the public's demand for retribution. Indeed, crime victims are persistently supportive of smart sentencing and crime reduction efforts – because failure to use best efforts produces victimizations that we should be avoiding. In any event, routinely gathering input from researchers about what they've learned about what works has limited social benefit without a strategy for accomplishing best efforts at crime reduction across the entire spectrum of criminal justice activities.

I urge the committee to focus on the critical task of developing such strategies. I would greatly welcome the opportunity to assist in any such efforts. I would also strongly recommend that the committee learn of the remarkable success of data-driven law enforcement strategies accomplished by Officer Jeffrey R. Myers of the Portland Police Bureau. Evidence-based approaches have enormous potential for improving our impact on crime across the entire range of criminal justice – from patrol to prosecution, sentencing to supervision and corrections and to post prison supervision. Without rigorous pursuit of best practices, our failures will continue to outnumber our successes, and our successes will remain temporary in the face of the next budget challenge, we will continue to magnify the financial costs of crime by irresponsibly tolerating its repetition, and we will continue to fail to protect our citizens from avoidable victimizations.